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INDEPENDENT REGULATORY
REVIEW COMMISSION

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Ms. Michelle T. Smey
Administrative Officer
State Board of Funeral Directors
P.O. Box 2649
Harrisburg, PA 17105-2649

October 24, 2007

Dear Board Members:

Thank you again for the opportunity to express my views on the Proposed Rulemaking concerning Preneed Activities of Unlicensed Employees.

As the Board has stated, these proposed rules are not dissimilar to the Exposure Draft presented by the Board in November of 2005. Accordingly, many of my comments will mirror those submitted to the Board at that time.

The court in *Walker v. Flitton* strongly urged the Board to give attention to resolving the unclarity in the area of prearranged funerals. In doing so, the Board is empowered to formulate rules and regulations that are not inconsistent with the law, address the proper conduct of the profession of funeral directing, and are necessary or proper to safeguard the interests of the public and the standards of the profession. The Board has suggested that these proposed rules are their attempt at being responsive to the court's mandate while remaining true to the act. The rules, as proposed, do neither.

Specifically, I offer the following for your review.

§ 13.206a. Utilization of unlicensed employees by a funeral entity

In Section 13.206(a), the draft regulations authorize a licensed funeral director to permit an unlicensed employee or agent engaged by the licensed funeral directors (hereinafter called an "Unlicensed Person(s)") to interact with customers concerning pre-need. In subsection (1) licensed funeral directors are held "professionally responsible" for the activities of an unlicensed person. In subsection (2) the unlicensed person is required to act under the "close supervision" of the licensed funeral director. Neither "professionally responsible" nor "close supervision" are defined, thus subjecting licensed funeral directors to possible civil or criminal sanction based on an arbitrary standard of conduct. Both of these terms need to be defined. Further, it is unfair, not to mention probably unconstitutional, to hold a licensed funeral director responsible for conduct he or she neither authorized nor allowed.

Requirement of "face to face" consultation.

Section 13.206(a)(4) requires a licensed funeral director who engages an unlicensed person to consult face to face with each pre-need customer before entering into or offering to enter into a pre-need funeral contract.

This provision of the draft regulations is unnecessary and will prevent consumers from being able to enter into pre-arranged funeral service agreements.

Initially, I note that in the Walker Decision Judge Jones found no evidence of any instances where unlicensed individuals involved in the sale of pre-need funeral services are a "festering problem". As with the Board Resolution of September 1999 that Judge Jones found unconstitutional, it appears that this draft regulation is designed to make it almost impossible for a licensed funeral director to utilize an unlicensed person to successfully interact with customers and disseminate price and other information regarding pre-need funeral services. There appear to be no rationale for this draft regulation other than to discourage such interaction and an ultimate sale to the consumer.

Consumers who have interacted with an unlicensed person may not want to meet "face to face" with a licensed funeral director. The consumer may prefer to conclude a sale by mail, speaking over the phone to a licensed funeral director or via the Internet (federal law allows electronic signatures). For example, a consumer who receives information at a group meeting (i.e. church, AARP, Lions, etc.) may wish to enter into a pre-need funeral agreement but may not wish to visit the funeral home or have a licensed funeral director come to his or her personal residence. Are these consumers to be deprived of the freedom of contract?

This requirement would also create the incongruous situation where an individual who had never met with anyone from a funeral establishment could enter into a pre-need funeral agreement via mail without ever speaking to a licensed funeral director, while an individual who has met with an unlicensed person cannot do so. Surely the Board does not intend this result.

Further, the draft regulations would prevent, among others, a soldier in Iraq, a retiree in Florida or a housebound or disabled person in Pennsylvania who had requested and received information about pre-arranging a funeral from an unlicensed person from entering into a pre-arranged funeral agreement unless a licensed funeral director could travel to meet with them.

As the Board is aware, there is a shortage of licensed funeral directors nationwide. In recognition of this fact, as Judge Jones noted, at least thirty-four states already allow unlicensed agents of funeral directors to sell pre-need funeral plans.

Licensed funeral directors often do not have the time or the ability to meet with individuals to arrange for the signing of a pre-arranged funeral agreement – even

assuming the consumer wishes to meet. In an age when most transactions are completed by mail, phone, or the Internet, it is unreasonable to require a "face to face" meeting.

Further there is no authority in the Law of this requirement. The General Assembly neither wished to nor believed it could regulate the public's right to enter into a contract.

Finally, both the Law and the Board's existing regulations already allow unlicensed persons to make tentative arrangements without a licensed funeral director when the situation is "at need". Why does the pre-need situation require greater protection when the consumer is then less emotionally vulnerable?

The Board's rationale for the "face to face" meeting appears to stem from Judge Jones' opinion in the Walker Decision. While Judge Jones' statement was certainly made in an effort to encourage the Board to provide guidance to licensed funeral directors, it was merely an expression of his personal opinion and does not carry the weight of law. Further, Judge Jones did not fully consider the matter of limit other alternatives.

A better provision to protect the public, consistent with the public's right to contract, would be to require a notice on any document to be signed by a consumer that the consumer had the right to an in-person meeting with a licensed funeral director before signing the document. The consumer could also be allowed, in writing, to waive this right to meet.

This suggested approach would protect the consumer without impinging on their rights. It is also consistent with a myriad of other consumer protection law, which allow consumers, after notice, to waive a right. These steps, together with the fact that only a licensed funeral director can enter into a pre-arranged funeral agreement and will accordingly review and monitor the unlicensed persons' activities, will provide comprehensive consumer protection.

Notice.

The Notice contained in Section 13.206(a)(5) should be revised consistent with my comments in the preceding section.

Unlicensed Persons' Authorized and Prohibited Activities.

Section 13.206(b) provides a very limited description of activities in which an unlicensed person may engage. Section 13.206(c), on the other hand, broadly restricts unlicensed persons from interaction with consumers. Neither of these Sections is consistent with Judge Jones' opinion in the Walker Decision in which he said that unlicensed persons may interact with consumers, disseminate accurate price information (not limited to a general price list) and solicit individuals for the purpose of having a licensed funeral director sell pre-arranged funeral services to the consumer. Judge Jones' opinion was based on the unlicensed persons' constitutional rights.

These draft regulations are overly restrictive and must be revised. Unlicensed persons should be able to do, at a minimum, everything that Judge Jones described in his opinion.

Section 13.206(c)(6) prohibits an unlicensed person from engaging in any activity that would cause a consumer to believe the unlicensed person is skilled in the "knowledge, science or practices of funeral directing". This is such a vague standard that it violates the due process protection of both the federal and Pennsylvania Constitutions. A licensed funeral director or unlicensed person could be subject to civil or criminal sanction based on a consumer's belief, not his or her own action. Who knows what people believe and why they believe it? By comparison, the Board's current regulations (49 Pa. Code 13.202) regulate unprofessional conduct, not perception.

Association with licensed funeral directors.

Section 13.206(c)(1) contains a prohibition on an unlicensed person being associated with "any other funeral director". Presumably, this means that an unlicensed person can only distribute materials, solicit sales and interact on behalf of one licensed funeral director at a time, although there is no specificity as to the time period of such association.

There is no basis in the Law for this prohibition and it is well beyond the Board's authority to impose such a restriction.

Further, this draft regulation violates an unlicensed person's rights of due process and equal protection as guaranteed by both federal and Pennsylvania Constitutions. The Board has not articulated any reason for this draft regulation and in fact has no right to prohibit unlicensed persons from engaging in a lawful activity for more than one licensed funeral director.

As a practical matter, an unlicensed person, whether a licensed insurance agent or not, very well may need to be engaged by multiple licensed funeral directors to earn a living as the pre-need market is not that broad.

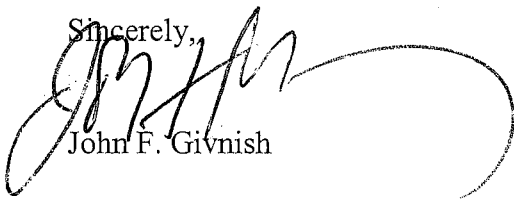
The Board's purpose in promulgating this draft regulation is unclear. If the Board wants to assure that a specific licensed funeral director will be responsible for an unlicensed person's conduct, the less restrictive manner in which to do this would be to have a licensed funeral director register the unlicensed person who was employed by the licensed funeral director and then require the unlicensed person to present that registration when interacting with a consumer.

This draft regulation is similar to one struck down by the Commonwealth Court in the McKinley case in 1973. In this draft regulation, as in McKinley, the Board attempts to regulate employment, not conduct.

Again, I would like to thank you for allowing me to comment on the draft regulations. I encourage the Board to adopt regulations that are both consistent with the Law and

individuals' constitutional rights and provide the public with an opportunity to consider a broad array of competitive pre-need funeral arrangements.

Sincerely,

A handwritten signature in black ink, appearing to read 'John F. Givnish', with a large, sweeping flourish extending to the right.

John F. Givnish